Filed 12/11/03 P. v. Deponte CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. DAVID ARTHUR DEPONTE, Defendant and Appellant.	C040402 (Super. Ct. No. 00F08280)

A jury convicted defendant David Deponte of murdering Rogelio Garcia and found that, in doing so, he intentionally and personally discharged a firearm within the meaning of Penal Code section 12022.53, subdivision (d). Defendant was sentenced to a term of 50 years to life in state prison.

On appeal, defendant raises various claims of instructional and evidentiary error. We shall affirm the judgment, but agree with defendant that an error in the abstract of judgment must be corrected.

FACTS

Defendant murdered Rogelio Garcia on the night of October 1, 2000, because, while working at a 7-Eleven, Garcia confiscated a counterfeit $100 bill that defendant was attempting to use. The pertinent facts are as follows:

About a week before the murder, defendant, while accompanied by Tracee Twedell and Miguel Godinez, purchased a counterfeit $100 bill. Thereafter, Godinez and defendant tried to exchange the bill at a carneseria, a Mexican food store. Nina Gonzalez was working at the store, used a special pen to mark the bill, and determined that it was counterfeit. She returned the bill to defendant.

Defendant told Godinez that he later attempted to pass the $100 bill at a 7-Eleven, but the "son of a bitch" clerk confiscated the counterfeit money. Defendant was angry with the clerk and wanted to "kick his butt."

On October 1, 2000, Godinez was with Jose Maldonado on the porch of Maldonado's apartment when defendant joined them. Twenty minutes later, they walked over towards the fence that was next to the apartment complex. Defendant was still upset about the 7-Eleven clerk and knew he would be walking home about this time. As the clerk, Rogelio Garcia, walked by on the opposite side of the street, defendant went through an opening in the fence and ran toward him. The two men argued and exchanged blows, and then defendant shot Garcia in the head with a black steel revolver, which Godinez had seen many times at Maldonado's apartment.

Defendant, who was wearing a black hooded shirt, ran back to the apartments. Maldonado, who was wearing a white tank top and

jeans shorts, ran over to the victim. Maldonado crouched over the victim and then returned with a phone, a couple of chains, and a bracelet.

Frank Belong lived in a nearby apartment. Around 11:00 p.m., he heard some yelling and looked out his window. Belong saw two men scuffling. One of them, who was wearing dark clothing, shot the other man and ran across the street toward some apartments. Another man, who was shorter, stockier and wearing a white tank top and shorts, ran over to the victim and appeared to remove some items from the victim's body.

Twedell testified that defendant left the apartment around 10:30 or 10:45 p.m. on the night of the killing, and was gone for about 30 minutes. When he returned, he washed something in the sink and then took a shower. Defendant was nervous and agitated, and instructed Twedell to tell anyone who asked that he had been with her the whole night. They went to a friend's apartment nearby and observed the crime scene from the porch. Defendant commented that the victim had deserved what happened to him. Twedell recalled that defendant spoke with someone on the phone and was angry about something, perhaps a gun, being in the barbecue.

Raquel Hernandez, the mother of Maldonado's son, testified that defendant, Maldonado, and Godinez left the apartment for a while on the night of the killing. When Maldonado returned with Godinez, Hernandez heard them saying, "he got him." Maldonado had a ring, a bracelet, and a cell phone. A few days later, Hernandez heard about the killing on the news, and Maldonado commented the victim was a snitch who deserved what he got. When defendant

visited the apartment the next day, he remarked that blood was squirting out of the guy's head like a waterfall.

Kevin Lacy testified that defendant told him about the counterfeit bill incident and said he was going to "take care of" the clerk. Lacy thought this meant that defendant intended to "rough him up." The next morning, defendant told Lacy that he had seen the 7-Eleven clerk walking near some apartments and that the clerk saw defendant and called the police on his cell phone. Defendant reiterated that he was going to take care of the clerk.

On the date of the killing, Lacy was visiting defendant and Twedell at defendant's apartment when defendant made a phone call and then told Lacy that defendant had to "go take care of it." Defendant said he would use a revolver because it would not leave any shells behind. Lacy returned to his own apartment, and defendant started banging on his door around 11:15 p.m. Defendant, who was breathing hard and sweating, removed a black jacket with a hood and asked Lacy to hold it for him. Lacy had a feeling something was not right and went outside to investigate. He saw the 7-Eleven clerk lying face down on the sidewalk.

Lacy went to defendant's apartment, whereupon defendant said, "I got him," and made a motion mimicking shooting a person in the head. He told Lacy that he had just taken a shower to clean off the gunpowder. Defendant also stated the victim deserved what he got.

The next night, Lacy and defendant went to Maldonado's apartment. Defendant and Maldonado started arguing because someone left a gun outside in a barbecue pit. Maldonado retrieved the gun,

and Lacy offered to take it to his apartment. The next day, when Lacy learned from his girlfriend that the police were "all over the apartment building," he threw the gun in a storm drain.

On the Thursday following the shooting, Lacy had to go to the police station concerning a misdemeanor warrant for petty theft. After a detective informed him that he also had warrants for petty theft in another jurisdiction, Lacy said he had information about Garcia's murder. He told the detective what he knew, but falsely claimed that defendant had thrown the gun out the window. Thereafter, he went with Detective John Kingsbury to recover the revolver from a nearby creek.

Hernandez testified that Maldonado owned a gun which looked like the one recovered from the creek. Due to corrosion on the interior surface of the barrel, a criminalist was unable to positively establish the revolver was used to kill Garcia, but the bullet found in his skull could have been fired from the revolver.

Co-Defendant Maldonado's Testimony

Maldonado, who was prosecuted for Garcia's murder on an aiding and abetting theory, was tried jointly with defendant, but with two separate juries so that both juries did not hear all of the evidence. For example, statements that Maldonado made to Detective Toni Winfield during pretrial interviews were introduced only before Maldonado's jury. In these interviews, Maldonado initially denied participating in the murder or having a cell phone or gun. He eventually acknowledged he owned two guns, had given one to defendant on the night of the murder, and had obtained a cell phone. A friend of Maldonado's hid the gun in defendant's barbecue

after the shooting; but when defendant complained, they retrieved the gun and gave it to Lacy.

Maldonado, who had two prior misdemeanor convictions and a felony conviction, testified in front of both juries. He admitted that he had spoken with the police and had not been truthful. And he admitted that he was a gang member, but denied that defendant or Garcia belonged to a gang. Maldonado also denied giving defendant a gun, explaining that he told Winfield this because he thought it was what the detective wanted to hear in order to let him go home.

Maldonado did not recall defendant saying anything about the 7-Eleven clerk before he left Maldonado's apartment on the night of the shooting. When Maldonado left to go retrieve something from a friend's apartment, he saw the clerk lying on the cement, went over to see what he had, and took some items from the clerk's body. Maldonado denied witnessing the killing.

DISCUSSION

I

Defendant contends the judgment must be reversed because of the inadequacy of the trial court's instructions regarding the testimony of accomplices.

The court gave the usual panoply of accomplice instructions, including the definition of the term, the need for corroboration of an accomplice's testimony, and the requirement that such testimony be viewed with care and caution. (CALJIC Nos. 3.10-3.14, 3.18, 3.19.) The court also advised the jury that it must consider whether the witnesses Lacy and Godinez were accomplices, and

that defendant had the burden of proving they were accomplices by a preponderance of the evidence. (CALJIC No. 3.19.)

Defendant claims that the trial court erred in failing to include codefendant Maldonado in this latter instruction, which, in defendant's opinion, had the effect of removing Maldonado's testimony and out-of-court statements from the requirements that they be corroborated and viewed with caution.

In assessing a claim of instructional error, "'the correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction.' [Citation.]" (*People v. Castillo* (1997) 16 Cal.4th 1009, 1016.) "[T]he reviewing court . . . must assume that the jurors are intelligent beings capable of understanding and correlating all the instructions which are given to them." (*People v. Lonergan* (1990) 219 Cal.App.3d 82, 91-92.) Defendant must show there is a reasonable likelihood that the jury understood the instructions in the manner he suggests. (*People v. Cain* (1995) 10 Cal.4th 1, 36.)

Maldonado was a codefendant who was tried for the same crime as defendant on an aiding and abetting theory. As such, he plainly and unambiguously fit the definition of an accomplice given to the jury, which "is a person who is subject to prosecution for the identical offense charged against the defendant on trial by reason of aiding and abetting." (CALJIC No. 3.10.) Consequently, despite the absence of Maldonado's name from the instruction under CALJIC No. 3.19, it is not reasonably likely that the jury would interpret the accomplice instructions as not applying to Maldonado.

In any event, the failure to give appropriate accomplice instructions is harmless if there is sufficient corroborating evidence in the record, i.e., evidence, even if slight, that tends to connect defendant with the crime in such a way as to satisfy the jury that the accomplice is telling the truth. (*People v. Brown* (2003) 31 Cal.4th 518, 556; *People v. Lewis* (2001) 26 Cal.4th 334, 370.)

Here, Godinez testified that he saw defendant, who was wearing dark clothing, shoot the victim in the head, and that he then saw Maldonado run across the street to the victim and return with a cell phone and jewelry. Godinez explained that defendant was angry because the victim had taken a counterfeit $100 bill from defendant after he tried to pass it unsuccessfully in the 7-Eleven where the victim worked.

Belong, who witnessed the shooting from his apartment, saw the victim shot by a man wearing dark clothing, and then a shorter, stockier man run across the street and take items from the prone victim.

Twedell testified that defendant left his apartment shortly before the shooting and returned soon after, whereupon he washed something in the kitchen sink, took a shower and changed his clothes. Defendant, who appeared nervous and agitated, instructed Twedell to tell anyone who asked that they were together all night. When defendant observed the crime scene from a friend's porch, he said the victim deserved what happened to him.

On the night of the shooting, defendant told Lacy that he shot the victim in the head and took a shower to remove any gunpowder

from his body. Defendant gave Lacy a black jacket to hold for him. Prior to the shooting, defendant had seen the clerk using a cell phone to call the police after the clerk saw defendant in the area following the counterfeit bill incident. Defendant had told Lacy he was going to "take care of" the clerk.

The testimony of these witnesses amply corroborates defendant's connection to the crime. In fact, nowhere in defendant's copious argument on this issue does he directly assert this aforementioned corroboration is insufficient as a matter of law. He simply elaborates why he believes all of the corroborating testimony is not credible, particularly that provided by Godinez and Lacy.

However, as we stated previously, the trial court properly instructed the jury that it must determine whether Godinez and Lacy were accomplices and, if so, it should view their testimony with caution and ensure it was corroborated. The court also instructed the jury how to assess a witness's credibility, particularly where the witness had criminal convictions, or had made inconsistent or willfully false statements. (CALJIC Nos. 2.13, 2.20, 2.21.2, 2.23, 2.23.1.) Hence, the jury was well equipped to assess the veracity of the witnesses' testimony.

These latter instructions regarding witness credibility also served to minimize any harm arising from the failure to explicitly instruct the jury to view Maldonado's testimony with distrust. (*People v. Lewis, supra,* 26 Cal.4th at p. 371.) The erroneous omission of accomplice instructions is harmless if the other instructions and circumstances would cause the jury to mistrust

Maldonado's testimony. (*People v. DeJesus* (1995) 38 Cal.App.4th 1, 26-27.)

The jury was aware that (1) Maldonado was a gang member who had committed prior criminal offenses, (2) he was on trial as a codefendant and had every reason to shift the blame to defendant, and (3) he made prior statements that were inconsistent with his trial testimony. The jury also was aware from the trial court's instructions that these factors cast doubt on Maldonado's credibility.

In light of these circumstances, as well as the plethora of corroborating evidence, it is not reasonably probable that defendant would have obtained a more favorable result if the trial court had mentioned Maldonado's name in its instruction under CALJIC No. 3.19. (*People v. Box* (2000) 23 Cal.4th 1153, 1209; *People v. Lewis, supra,* 26 Cal.4th at p. 371.)

II

Next, defendant challenges the introduction of an extrajudicial statement Maldonado made when Detective Winfield interviewed him. As set forth in the statement of the facts, Maldonado said he had given defendant a gun on the night of the murder.

Prior to trial, the prosecutor moved to try the case against defendant and Maldonado before dual juries because (1) she needed to introduce Maldonado's inculpatory pretrial statement, (2) it was impossible to adequately redact the statement to exclude reference to defendant, and (3) it would violate the *Aranda/Bruton* rule (*People v. Aranda* (1965) 63 Cal.2d 518; *Bruton v. United States* (1968) 391 U.S. 123 [20 L.Ed.2d 476]) if the statement was admitted

against defendant and if Maldonado did not testify. In response, defendant moved to sever his trial from Maldonado's. The trial court granted the motion for dual juries, and denied the motion to sever.

After Detective Winfield testified before Maldonado's jury about Maldonado's pretrial statement, Maldonado testified before both juries. Denying he gave defendant a gun, he explained that he made the statement to Winfield because he thought it was what the detective wanted to hear since she had already informed him that she knew defendant shot Garcia.

The prosecutor then sought to introduce the tape recording of Maldonado's pretrial interviews. She argued that Maldonado's trial testimony indicated the only reason he made the prior inconsistent statement about defendant's involvement was because the detective had given him defendant's name. According to the prosecutor, it was necessary for the jury to hear the entire tape recording of Maldonado's interviews to establish that this was not true.

Over the objection of defendant, who renewed his request for a separate trial, the trial court permitted the tape-recorded interviews to be played before both juries.

Under the *Aranda/Bruton* rule, the extrajudicial statements of a nontestifying codefendant implicating the other defendant generally are inadmissible against the other defendant in a joint trial because that defendant is deprived of the right to confront a witness providing incriminating evidence. (*People v. Aranda, supra,* 63 Cal.2d at pp. 530-531; *Bruton v. United States, supra,*

391 U.S. at pp. 126-128 [20 L.Ed.2d at pp. 479-481].)[1] However, where the codefendant testifies and either denies, acknowledges, or qualifies the truth of the prior statement, there is no violation of the other defendant's confrontation rights. (*Nelson v. O'Neil* (1971) 402 U.S. 622, 626-630 [29 L.Ed.2d 222, 226-228]; *People v. Jenkins* (1973) 34 Cal.App.3d 893, 896; *United States v. Armijo* (9th Cir. 1993) 5 F.3d 1229, 1234.)

Here, defendant's confrontation rights were not violated since Maldonado testified and thus was available for cross-examination. Nevertheless, defendant claims that we must reverse his conviction because the extrajudicial statement was hearsay and inadmissible against defendant. He argues that Maldonado's taped statements "should not have been played to impeach him with [defendant's] jury present or without admonishing [the] jury that the taped statements could not be considered against [defendant], or else a severance should have been granted when Maldonado elected to testify."

Defendant's multi-faceted claims of error (in admitting evidence, failing to give a limiting instruction, and failing to sever the trials), all require proof that Maldonado's extrajudicial statements were not admissible against defendant. But defendant does not provide any cogent legal analysis explaining why these statements were not admissible as prior inconsistent statements

---

[1] The truth-in-evidence provision of Proposition 8 (Cal. Const., art. I, § 28, subd. (d)) abrogated *People v. Aranda* to the extent that *Aranda* required relevant evidence to be excluded when federal constitutional law did not require exclusion. (*People v. Fletcher* (1996) 13 Cal.4th 451, 465.)

under Evidence Code section 1235, which provides that "[e]vidence of a statement made by a witness is not made inadmissible by the hearsay rule if the statement is inconsistent with his testimony at the hearing and is offered in compliance with Section 770."

Evidence Code section 770 states: "Unless the interests of justice otherwise require, extrinsic evidence of a statement made by a witness that is inconsistent with any part of his testimony at the hearing shall be excluded unless: [¶] (a) The witness was so examined while testifying as to give him an opportunity to explain or to deny the statement; or [¶] (b) The witness has not been excused from giving further testimony in the action."

Maldonado testified and was given an opportunity to explain his prior inconsistent statement regarding giving defendant a gun. Thus, his extrajudicial statement could be admitted not only to impeach his credibility, but as substantive evidence of the truth of his pretrial statements. (*People v. Montiel* (1993) 5 Cal.4th 877, 930; *People v. Pitts* (1990) 223 Cal.App.3d 606, 858-859; *People v. Baker* (1978) 88 Cal.App.3d 115, 125; CALJIC No. 2.13.) In other words, Maldonado's pretrial statement was admissible to prove that he had given defendant a gun on the night that defendant fatally shot Garcia. (Cf. *People v. Pitts, supra,* 223 Cal.App.3d at pp. 858-859; *People v. Jenkins, supra,* 34 Cal.App.3d at p. 896.)[2]

---

[2] Defendant also complains the entire interview was not admissible as a prior inconsistent statement and, therefore, it should not have been introduced before his jury. Aside from the fact this argument was raised without good cause for the first time in defendant's reply brief (*People v. Adams* (1990) 216 Cal.App.3d 1431, 1441, fn. 2), defendant fails to

The fact that Maldonado's inconsistent extrajudicial statement about giving defendant a gun was admissible as substantive evidence against defendant undermines his contention that the trial court should have given the jury a limiting instruction to the effect the statements were admissible only against Maldonado to impeach his credibility. Moreover, defendant overlooks that he did not request such a limiting instruction and the trial court had no duty to give one sua sponte. (*People v. Carpenter* (1999) 21 Cal.4th 1016, 1050, fn. 6; *People v. Montiel, supra,* 5 Cal.4th at p. 928, fn. 23; *People v. Collie* (1981) 30 Cal.3d 43, 64.)

Defendant relies on *United States v. Sauza-Martinez* (9th Cir. 2000) 217 F.3d 754, to support his claim that the trial court had a duty to give a limiting instruction. But in that case, unlike the present one, the testifying codefendant's statements were inadmissible hearsay as to the accused. Therefore, the district court erred in refusing the *accused's request* for a limiting instruction. (*Id.* at pp. 758-760.)

In any event, the determination of defendant's guilt was not solely dependent on Maldonado's extrajudicial statement or his

---

explain why the recording was inadmissible to refute Maldonado's claim that his statement he gave defendant a gun was a lie because the detectives led him to believe this is what they wanted and provided him with defendant's name. Only by listening to the tape recordings of all the interviews could the jury discern that the detectives exerted no subtle pressure or inducement to lie during the interviews. More importantly, defendant proffers no explanation as to how the rest of the tape recording, other than the properly admitted prior inconsistent statement, was prejudicial to him. Accordingly, his claim is unavailing. (*People v. Gurule* (2002) 28 Cal.4th 557, 619; *People v. Freeman* (1994) 8 Cal.4th 450, 482, fn. 2.)

credibility. In light of all the other incriminating evidence against defendant provided by Godinez, Lacy, Twedell, and Belong, there was ample evidence defendant shot Garcia, without resorting to Maldonado's pretrial statement that he had given defendant a gun on the night of the shooting. In other words, it is not reasonably probable that the exclusion of Maldonado's statement would have yielded a different result.

And the fact that the introduction of Maldonado's statement did not result in a miscarriage of justice compels the conclusion that defendant was not prejudiced by the denial of his severance motion. (*People v. Morganti* (1996) 43 Cal.App.4th 643, 675 [denial of a severance motion is not reversible error unless it is reasonably probable the jury would have reached a different result if there had been separate trials].) In view of all the other incriminating evidence against him, it is not reasonably probable that defendant would have obtained a more favorable result in a separate trial.

Accordingly, defendant's multi-faceted claim of error is unavailing.

III

Defendant argues the trial court improperly precluded him from impeaching Godinez in a manner that would demonstrate he was not a neutral witness. In particular, defendant complains that he was prevented from establishing (1) Godinez's prior conviction for accessory after the fact to murder was not based simply on his failure to provide information, as opposed to helping the perpetrator "get away with" the crime, (2) Godinez entered into

a plea agreement to avoid being charged with murder, and (3) Godinez's attorney told him that he would be prosecuted for murder if he did not take the plea agreement. Defendant argues that the exclusion of this impeachment evidence violated his Sixth Amendment right to confront witnesses against him and his constitutional right to present a defense.

"[A] criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby 'to expose to the jury the facts from which jurors . . . could appropriately draw inferences relating to the reliability of the witness.'" (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 680 [89 L.Ed.2d 674, 684] (hereafter *Van Arsdall*), quoting *Davis v. Alaska* (1974) 415 U.S. 308, 318 [39 L.Ed.2d 347, 355].)

However, not every restriction of cross-examination amounts to a constitutional violation, and the trial court retains wide latitude in restricting cross-examination that is repetitive, prejudicial, confusing of the issues, or of marginal relevance. (*Van Arsdall*, *supra*, 475 U.S. at pp. 678-679 [89 L.Ed.2d at p. 683].) Unless defendant can show the prohibited cross-examination would have produced "a significantly different impression of [the witnesses'] credibility" (*Van Arsdall*, *supra*, 475 U.S. at p. 680 [89 L.Ed.2d at p. 684]), the court's exercise of its discretion in this regard does not violate either the Sixth Amendment or the California Constitution. (*People v. Frye* (1998) 18 Cal.4th 894, 946.)

Here, the jury was well aware that Godinez was a gang member who had a prior felony conviction for accessory after the fact to murder. The jury also knew that Godinez admitted he initially lied to the police about not witnessing Garcia's murder. Godinez had accompanied defendant when he attempted to pass the counterfeit bill to Gonzalez, and on the night of the murder, walked with him to the fence where defendant waited for Garcia to appear on his way home from work. Godinez knew defendant was angry with Garcia and wanted to "kick his butt." These circumstances indicated Godinez was sufficiently involved such that the trial court gave the jury accomplice instructions regarding his testimony. All of these factors rendered Godinez's credibility extremely suspect. Thus, the details of his involvement as an accessory after the fact to murder would not have cast him in a significantly different light.

Since defendant cannot show that introduction of the excluded line of cross-examination would have produced a significantly different impression of Godinez's credibility, the trial court's evidentiary rulings did not violate defendant's rights under the Sixth Amendment. (*People v. Frye, supra,* 18 Cal.4th at p. 947; *People v. Greenberger* (1997) 58 Cal.App.4th 298, 354.)

Nor did the court's rulings prevent him from presenting a defense. "As a general matter, the '[a]pplication of the ordinary rules of evidence . . . does not impermissibly infringe on a defendant's right to present a defense.' [Citations.] Although completely excluding evidence of an accused's defense theoretically could rise to this level, excluding defense evidence on a minor or subsidiary point does not impair an accused's due process right to

present a defense. [Citation.] If the trial court misstepped, '[t]he trial court's ruling was an error of law merely; there was no refusal to allow [defendant] to present a defense, but only a rejection of some evidence concerning the defense.' [Citation.] Accordingly, the proper standard of review is that announced in *People v. Watson* (1956) 46 Cal.2d 818, 836, and not the stricter beyond-a-reasonable-doubt standard reserved for errors of constitutional dimension (*Chapman v. California* (1967) 386 U.S. 18, 24 [17 L.Ed.2d 705, 710-711])." (*People v. Fudge* (1994) 7 Cal.4th 1075, 1102-1103; *People v. Cudjo* (1993) 6 Cal.4th 585, 610-611.)

In sum, it is not reasonably probable that the jury would have reached a different verdict had defense counsel been permitted to pursue the challenged line of questioning.

IV

Over defense counsel's objection, the trial court permitted the prosecutor to introduce the testimony of Detective Angel Delgadillo regarding Gonzalez's selection of the photographs of Godinez and defendant as the two men who tried to pass the counterfeit bill in her store. According to Delgadillo, Gonzalez positively identified Godinez and stated the man accompanying him resembled defendant's picture.

Defendant contends the court erred in admitting the evidence as a prior identification pursuant to Evidence Code section 1238.[3]

---

[3] Evidence Code section 1238 provides: "Evidence of a statement previously made by a witness is not made inadmissible by the hearsay rule if the statement would have been admissible if made by him while testifying and: [¶] (a) The statement is

This is so, he argues, because Gonzalez did not testify that she remembered selecting defendant from the photographic lineup, that her selection was a true reflection of her opinion at the time, or that she made the selection at a time when the crime was fresh in her memory. Rather, she stated she did not remember being shown another photo and picking out someone who looked like the man who was carrying the counterfeit bill.

The People agree that the evidence was not within the hearsay exception set forth in Evidence Code section 1238, but argue the evidence was admissible as a prior inconsistent statement under Evidence Code section 1235.

Defendant disagrees. He contends that because Gonzalez simply stated she did not recall making the identification and there is no evidence she was being deliberately evasive, Delgadillo's testimony about Gonzalez's prior statements did not meet the requirements of section 1235. (*People v. Johnson* (1992) 3 Cal.4th 1183, 1219-1220.)

We need not address the merits of this contention because, even if error occurred, it was not prejudicial. As we explained previously, a court's rulings with respect to the ordinary rules of evidence are reviewed under the standard set forth in *People v. Watson*, *supra*, 46 Cal.2d at page 836. (*People v. Fudge*, *supra*,

---

an identification of a party or another as a person who participated in a crime or other occurrence; [¶] (b) The statement was made at a time when the crime or other occurrence was fresh in the witness' memory; and [¶] (c) The evidence of the statement is offered after the witness testifies that he made the identification and that it was a true reflection of his opinion at that time."

7 Cal.4th at pp. 1102-1103; *People v. Cudjo, supra,* 6 Cal.4th at pp. 610-611.) Under this standard, the error, if any, was not prejudicial. (*People v. Johnson, supra,* 3 Cal.4th at p. 1220 [the erroneous admission of hearsay as a prior inconsistent statement was harmless under the *Watson* standard].)

Gonzalez was able to identify Godinez as the person who accompanied the man who attempted to pass the counterfeit bill at her store, and Godinez identified defendant as the person with whom Gonzalez saw him. Furthermore, there was ample evidence establishing that defendant shot the victim. Under the circumstances, it is not reasonably probable that the jury would have reached a different verdict had the challenged evidence been excluded. (*People v. Johnson, supra,* 3 Cal.4th at p. 1220.)

V

At the request of the prosecutor, and over the objection of defendant, the trial court advised the prospective jurors at the start of voir dire that this was not a death penalty case. It did so by asking and stating: "Are there any of you who are members . . . of any religious organization that does not believe in judging others? [¶] This is not a -- just to head off some questions that one or more of you may have, this is not a death penalty case."

Defendant argues the court erred by injecting impermissible and irrelevant considerations regarding the penalty. According to defendant, this lessened the prosecution's burden of proof because it diminished the pressure on the jurors and reduced their sense of responsibility for their actions.

A similar contention was rejected in *People v. Hyde* (1985) 166 Cal.App.3d 463 (hereafter *Hyde*), which stated: "We believe the trial court's comments [regarding the death penalty's absence] were proper and prudent. The public commonly understands that in contrast to other criminal cases, the jury in a death penalty murder case must determine penalty as well as guilt. The moral and ethical questions surrounding the use of the death penalty have generated considerable social debate. It is reasonable to anticipate that a significant number of prospective jurors might question their ability to sit on a jury which potentially would have to consider imposition of a sentence of death. Not only did the trial judge's decision to raise and dispose of the issue at the outset save time and unnecessary strain on potential jurors' psyches, but it also avoided any possibility that a prospective juror's concern about serving on a death penalty case might skew his answers to voir dire questioning." (*Id.* at p. 479; see also *State v. Mott* (1997) 187 Ariz. 536, 547 [931 P.2d 1046, 1057]; *State v. Wild* (1994) 266 Mont. 331, 335-337 [880 P.2d 840, 843-844]; *Stewart v. State* (1985) 254 Ga. 233, 234 [326 S.E.2d 763, 764]; *Burgess v. State* (Ind. 1983) 444 N.E.2d 1193, 1196; but see *Commonwealth v. Smallwood* (1980) 379 Mass. 878, 882 [401 N.E.2d 802, 805] [instructing jury of the death penalty's absence, "however ill-advised, [did not amount] to error of reversible magnitude"].)

Hyde also rejected the notion that the jurors would shirk their duty to carefully assess the evidence simply because they learned the case was not a capital one. *Hyde* concluded it is

"impossible to contend that a jury charged with trying a murder defendant in a noncapital case is more likely to unfairly convict because of a diminished 'sense of responsibility.'" (*Hyde, supra,* 166 Cal.App.3d at p. 479.)

We find the reasoning in *Hyde* persuasive. The penalty of death is unique, and its possible application can be a secretly held concern of prospective jurors in a murder case, causing them to skew their answers to questions on voir dire. The challenged instruction was an effort to remove extraneous considerations by informing prospective jurors what the sentence would not be so they would not be distracted by irrelevant concerns about the death penalty during voir dire. It did not improperly introduce sentencing information during the guilt phase that would be likely to cause the jurors to convict defendant based on matters having nothing to do with his guilt.

Moreover, the trial court stressed during its instructions prior to jury deliberations that the jurors "must not discuss nor consider the subject of penalty or punishment. That is a matter which must not in any way affect your verdict." (CALJIC No. 17.42.) We must presume the jury followed the court's instructions. (*People v. Ceniceros* (1994) 26 Cal.App.4th 266, 281.)

In short, it is not reasonably likely that the challenged instruction led the jurors to believe there was a lesser burden of proof involved in a noncapital case or that they frivolously convicted defendant simply because they were aware this was not a death penalty case, rather than because of the strong evidence that he gunned down Garcia in cold blood.

In his reply brief, defendant claims the advisement that this was not a death penalty case is only half the problem. The other half is that the court did not give a requested defense instruction informing jurors that this was a life imprisonment case. Defendant chastises the People for "offer[ing] nothing on that half" in their respondent's brief.

The People's oversight is likely explained by the fact that this "other half" of the "problem" was not pointed out in the argument heading in defendant's opening brief. An appellant must present each point separately in the opening brief under an appropriate heading showing the nature of the question to be presented and the point to be made. (Cal. Rules of Court, rule 14(a)(1)(B); *People v. Crosswhite* (2002) 101 Cal.App.4th 494, 502, fn. 5; *People v. Harper* (2000) 82 Cal.App.4th 1413, 1419, fn. 4; *Opdyk v. California Horse Racing Bd.* (1995) 34 Cal.App.4th 1826, 1830-1831, fn. 4.)

Moreover, defendant's argument on this point consists of only one cursory paragraph, as follows: "The trial court having, over objection, brought up that the penalty was not so severe in this fashion, should at the least have described the maximum penalty that was at issue, as the defense requested. This would at least have reminded the jurors to listen with great care and informed them of the seriousness of their task being but only slightly diminished. It might have somewhat offset the notion that this case was not of such great responsibility for getting the decision right. Also, if it is fair to advise the jurors of

the penalty that will not be applied, certainly they deserve to be informed of the one that may."

Defendant provides no other analysis or any authority to support his allegedly separate assertion of instructional error. Under the circumstances, not only is the People's failure to respond understandable, defendant has waived any claim that the trial court erred in refusing to give the requested instruction. (*People v. Turner* (1994) 8 Cal.4th 137, 214, fn. 19 [a reviewing court may disregard claims perfunctorily asserted without development and without clear indication they are intended to be discrete contentions]; *People v. Harper, supra,* 82 Cal.App.4th at p. 1419, fn. 4 [argument may be waived if it is not set forth under a separate argument heading and is raised in a perfunctory fashion (e.g., one paragraph) without any supporting analysis and authority].)

VI

Lastly, defendant properly contends, and the People concede, the abstract of judgment must be corrected because it erroneously reflects that the trial court ordered defendant to submit to AIDS testing when, in fact, the court only ordered that blood and DNA samples be provided to law enforcement for identification analysis. (Pen. Code, § 296, subd. (a)(1)(B).) We shall direct the trial court to make the necessary correction.

DISPOSITION

The judgment is affirmed. The trial court is directed to correct the abstract of judgment by striking the recitation about AIDS testing and to reflect, instead, that defendant was ordered

to comply with the requirements of Penal Code section 296. The trial court is further directed to send a certified copy of the corrected abstract to the Department of Corrections.

SCOTLAND, P.J.

We concur:

RAYE, J.

HULL, J.